IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

RONALD W. HAY, ET AL.

PLAINTIFFS

VS. CIVIL NO. CCB-08-2662

CONSTELLATION ENERGY GROUP, INC., ET AL. ERISA LITIGATION

DEFENDANTS

Baltimore, Maryland
June 17, 2010

The above-entitled case came on for a motions hearing before the Honorable Catherine C. Blake, United States District Judge

A P P E A R A N C E S

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For the Individual Defendants:

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P R O C E E D I N G S

THE COURT: I see some of you again. Please be seated.

THE CLERK: The case pending before this Court is Civil Action Number CCB-08-cv-2662, Ronald Hays versus Constellation Energy Group, Inc., et al. This matter is set in for a motions to dismiss hearing.

THE COURT: All right. Good afternoon, Mr. Mathias.

MR. MATHIAS: Good afternoon, Your Honor.

THE COURT: I will just tell you a couple of things that I am looking for help on from both sides as we go through, which you probably were going to do. There's a question of who exactly are the fiduciaries, where do we have an agreement, and where do we not?

I would like some focus on the actual specific controlling language of the plans, which is obviously critical and seems to be somewhat different between Constellation and Nine Mile, counsel, a little bit of discussion, and this may be more on the plaintiffs' side, understanding that you think that at some point it was not prudent to continue contributions to the company stock fund, when, and I guess for both, does it make a difference whether we are talking about continuing to offer the stock fund as an option for

participants versus continuing to contribute the matching amount to, the employer matching amount to a stock fund? Is there any difference in the obligations? Does the language of the Plan make any difference in how the fiduciaries, whoever they were, should have looked at those options?

And I am also happy to hear whatever it is you were going to say anyway.

MR. MATHIAS: Thank you, Your Honor, Jim Mathias for the individual defendants. I'm going to address Count I, prudence and loyalty.

THE COURT: Okay.

MR. MATHIAS: Mr. Gillespie, who represents Constellation and Nine Mile, will address the other counts and perhaps some specific matters to the company.

THE COURT: Okay.

MR. MATHIAS: I would like to start with just a brief overview and then go back in some detail and address some of the questions Your Honor has.

Both in the securities case you heard this morning and the ERISA case this afternoon, we basically have the same core facts and factual theories, and all of this takes place within the framework of a worldwide credit market meltdown, where

stocks dropped for a number of companies for a number of reasons.

The ERISA prudence laws in the stock-drop context are not designed to deal with all bad news or every stock drop or every adverse development. Instead, they are designed to deal only with extraordinary circumstances that create a duty for a fiduciary in this context to disobey a Plan that says the company stock will be offered, and to order a complete divesting of company stock from the Plan, because there's no duty of diversification.

So if there's an argument in this context with an ESOP that the fiduciary had a duty to step in and act, it's a duty to divest entirely at a particular point in time of all company stock.

So that's both a unilateral and somewhat extraordinary, if not radical, alteration of the Plan participants' portfolios, and of their choice, and that's an important point that I will come back to, that in this instance, the Plan participants, at any point in time they have complete discretion to decide what offerings in the portfolio they want to invest in, and they can change it at anytime.

So in keeping with the extraordinary nature of this kind of action being asked of a fiduciary or

being put on a fiduciary as a duty, the plaintiffs need to show not just the price drop, but some kind of precipitous decline, an extraordinary decline in the stock price. And more than that, they need to show that the fiduciaries had some knowledge or should have known in advance that the stock price was going to continue to decline in the future, such that they had an obligation to step in and act.

Furthermore, in most cases the plaintiffs need to show some knowledge of not just a decline, but of an imminent collapse in the company, in the company's stock price, and at the very least, need to show that they are dealing with some dire situation.

I think it has been described in a number of the cases as, if you get to the Moench presumption, that is a substantial shield that protects the fiduciary from having to act, and the point is you don't react to every possible stock drop.

With regard to that, in terms of showing extraordinary circumstances that take this out of the case of what most companies were dealing with, which were just on a day-to-day basis, everyone trying to decide what's going on with the credit market, what's going on with the overall economy, what's going to happen tomorrow, what's going to happen the day after

tomorrow, the plaintiffs have pointed to three buckets of factual allegations which will be familiar to you from the securities case.

THE COURT: Let me back up for one second before that.

MR. MATHIAS: Sure.

THE COURT: You said that what you think they are suggesting is that there would have been a duty to not just take away the availability of the company stock fund as an option for participant contributions, not make any further investments in company stock funds, you're interpreting what they are requesting, the obligation that they would impose would be a complete divestiture, sell off all the company stock.

MR. MATHIAS: Well, I believe that's the legal test here. There's no duty to diversify in an ESOP. So if you decide that the company stock is an imprudent investment, you've decided that one share is too many. I think that's an important point, because I think it speaks to the legal principles that the Court should apply in this case.

The factual background, the buckets of allegations, and I'll come back to these and discuss them in more detail later, but the three things that the plaintiffs in their Amended Complaint and in the

motions papers focus on is simply that Constellation had a risky business model and was mismanaging the company, and should have known that they had a risky business model that was going to lead to the company stock becoming an imprudent investment.

They also point to the collateral downgrade estimate calculation error, and they point to the Lehman situation in September of 2008 and its effect on Constellation.

We believe the facts here show, and if you look at the allegations, that at all times Constellation's future stock performance remained unpredictable, unknowable, and that the company was reacting just like everybody else to an unfolding situation, and that the plaintiffs have got to allege something that suggests that the fiduciaries knew something different and knew what was going to happen and, therefore, should have acted, because there is no obligation for the fiduciaries to outsmart the market.

So here, ultimately the facts will matter, the knowledge or the should have known of the fiduciaries will matter, and I'm going to spend more time on this later, the timing of when things occurred and how they occurred really does matter here, because there is a difference between knowing something in advance on the

one hand, and reacting to a situation on the other hand. We think that the facts as alleged here from an ERISA standpoint actually are quite unremarkable.

So with that as a prelude, I want to turn to the Plans. The Plans, both the Constellation Plan and the Nine Mile Plan, here were EIAP's, Eligible Individual Account Plans, and the Constellation Common Stock Fund, which was offered in both Plans, is an ESOP, the purpose of which is to encourage employee ownership in Constellation's stock.

The Plans consisted of voluntary contributions by the participants and the company-matching contributions.

The company match, at all times and in all cases, here was always in the Constellation Common Stock Fund in both Plans, and that's specified in the Plans and the SPD's for the Plans, that the company match shall be initially invested, or will be automatically invested in the company stock.

Now an important point is immediately, if the participant does not want to have company stock, they may move it into one of the other 20, I believe it was 23 different offerings in the overall Plans. So there was a Constellation Common Stock Fund, an Interest Income Fund, and then about 20 mutual funds, and 24

hours a day, seven days a week, there were ways for Plan participants to give the Plan notice that they wanted to change their portfolio.

The Plans themselves do not in any way expressly grant the fiduciaries any discretion to remove Constellation stock as an option in the Plan. I think that's an important point here.

Essentially, you would have had to rewrite the Plan with regard to matching contributions and other things if Constellation stock were to be removed from the Plan, and that is a settlor function.

You will notice in the papers frequently the plaintiffs, in the motions papers, refer to Constellation generically and don't designate whether they are talking about them as a fiduciary or whether they are talking about them as the settlor of the Plan, but that's an important distinction, because in a Plan like this, it's the settlor who decides what goes into the plan.

THE COURT: Right.

MR. MATHIAS: The only argument that the plaintiffs have raised is the argument having to do with the use of the word or, which suggests to them that the fiduciary somehow had discretion to remove Constellation stock from the Plan. But if Your Honor

goes back and looks at what the Plan says, it's talking about investments and it says the money can be invested in the Constellation Stock Fund, the Interest Income Fund, or the Plan, the offerings picked by the fiduciaries. So you have three things.

THE COURT: Well, it says any other -- I mean I'm looking at page 16 of the Plan, Section 5.1(a). That is the Constellation Plan now that I'm looking at.

MR. MATHIAS: Right.

THE COURT: It's one or more of the following investment funds, and it's the CEG Common Stock Fund, the Interest Income Fund, or any other investment fund selected by the Investment Committee from time to time.

MR. MATHIAS: So that the Plan designates. You have the Constellation Common Stock Fund. You have the Interest Income Fund, and then you have other investment funds selected by the Investment Committee.

Then in the definitions section, it actually defines those terms of investment funds and other investment funds, investment funds to include Constellation stock. Other investment funds does not. That is at Appendix A.

THE COURT: Okay. The definitions. Why does

that not give the fiduciary the discretion to leave out the Common Stock Fund, to say well, we're going to go with some of these other investment funds?

MR. MATHIAS: First of all, it's an ESOP that says matching contributions are automatically, or shall be invested in the company stock.

THE COURT: I understand that.

MR. MATHIAS: It presupposes that the company stock is going to be involved.

THE COURT: Right.

MR. MATHIAS: The disjunctive of or means that there are going to be three offerings. There's going to be the Constellation stock. There's going to the Interest Income Fund, and then there's going to be any other investment funds that are selected by the Committee.

That doesn't suggest that the Investment Committee has any discretion from the settlor to influence one or two.

THE COURT: Well, but then how do you interpret it when it says contributions for the Plan will be invested in one or more of the following?

MR. MATHIAS: Because contributions to the Plan will be -- first of all, it says invested.

Remember, this is the Plan that controls what

Plan participants can do. Plan participants put in their own money, and they can put it into anything they want to.

THE COURT: Right.

MR. MATHIAS: So they don't need to invest in Constellation Common Stock.

THE COURT: Right.

MR. MATHIAS: They can invest in any one of those three. But what we are talking about here is what the settlors have determined should be offered. If the fiduciary stepped in and took away the CEG Common Stock Fund, then that statement would no longer be true.

The way the settlor set it up, a Plan participant would not be able to invest in it. So you would be changing the character of the fund and you would be changing the options available for people to invest.

THE COURT: Okay.

MR. MATHIAS: Again, I think I made this point, but it's talking about how the money would be invested, not what the selections are that are available.

So with that, let's turn to the --

And with regard to your question about the

fiduciaries, there was a question about whether anyone was acting as a fiduciary here, and I'm going to get to that in just a second. But to the extent a fiduciary, that a duty arose for a fiduciary to act, we believe it would be limited to the Investment Committee members and the Plan Administrator, Ms. Behlert, not to Constellation.

THE COURT: The Investment Committee and Ms. Behlert?

MR. MATHIAS: Right.

Now the threshold issue, Your Honor, is that a fiduciary cannot be liable for breaches of duty of prudence if they are not acting as a fiduciary.

In this case, as we just talked about, Constellation stock is to be offered. That's the rule. That's consistent with section 404(a)(1)(D) of ERISA which says a fiduciary is required the follow the Plan so long as it is consistent with the rest of ERISA.

So where a duty might arise in certain circumstances would be a narrow exception where the situation is so extraordinary that even though the Plan says stock will be offered, the fiduciary makes a decision that it would not be prudent and, therefore, is not consistent with ERISA.

So our position, just so it's clear, is there's no fiduciary power to take Constellation stock out of the Plan unless you get to that circumstance, that extraordinary circumstance. Again, as we mentioned earlier, that's consistent also with the absence of any duty to diversify.

So that's the threshold question. The cases usually focus on that.

The next thing you get to is you say are we going to recognize a Moench presumption, what has been called the Moench presumption?

Your Honor, I think that the Moench presumption really does flow out of that idea that there is not a fiduciary power to act unless an extraordinary circumstance exist.

In that regard, it really isn't an evidentiary presumption or an affirmative defense. The courts have said, and the trend in the law is that where you have this situation, the plaintiffs have to plead some facts that suggest that this extraordinary circumstance exist so that a duty in fact has arisen where it otherwise wouldn't under the Plan.

So we believe the Moench presumption both applies here and applies at the motion to dismiss stage, which the Third, Fifth, Seventh and Ninth

Circuits all have found, and certainly many trial courts over the last several years have adopted that.

Now in terms of what you would do other than the Moench presumption, the only thing the plaintiffs have pointed to is the DiFelice standard.

I would just say the DiFelice case, if you look at it, was a completely different circumstance, where the company was the fiduciary. The company had, as the fiduciary, had complete discretion on what to do if terms of what the options were with regard to company stock, and in fact, there were things in the Plan that discouraged the use of company stock.

THE COURT: Right.

MR. MATHIAS: So the Moench presumption really ought to apply here.

The other reason, or the other thing to point out at this point about the Moench presumption is it reflects the reality that if you hold the fiduciary to too wide a standard or too quick a standard in terms of when a fiduciary has to step in and divest of company stock -- in other words, if you were to suggest that any time there's a drop in the stock price, they would have to do something -- you really create a terrible Catch-22 for the fiduciary because if they divest of the stock, and then the next day or

the next week the stock rises, and they have taken everybody out, they're going to get sued for that.

So they're on the horns of a dilemma, and that's why it should only be, it should only be exercised in the most extraordinary circumstances.

So that gets us to whether in this case they have alleged facts that would overcome the Moench presumption or to suggest that there is any abuse of discretion by the fiduciary.

THE COURT: Do you think it makes a difference in the applicability of the Moench presumption or anything else that there's a difference in language between the Constellation Plan and the Nine Mile Plan?

MR. MATHIAS: I don't, Your Honor, because, first of all, I think the cases now indicate that if the Plan in any way -- some cases have gone so far as to say if the Plan permits the use, or the offering of company stock.

But if the Plans presuppose, for instance, the use of company stock where it's an ESOP and there's some limitation on the discretion to take company stock out, and they're clearly trying to encourage employee ownership of company stock, that the Moench presumption ought to apply.

While the language is slightly different in the

two Plans, when you look at the NMP Plan and the SPD that describes it, it's pretty clear that it presupposes at the very least that company stock will be offered. The language in the SPD is that it will automatically, all matching contributions will be invested in company stock. So I don't think it makes a difference.

With regard to overcoming the Moench presumption, I now want to go back to the factual allegations, and the first one is this notion of mismanagement or some kind of improper or imprudent business strategy. It's repeated several times in the Amended Complaint, but it's listed as a list of five or six items in paragraph seven and several other paragraphs in the Amended Complaint. We also mentioned it, repeated it in our motion to dismiss at page five.

But essentially the theory is that Constellation's fiduciaries knew or should have known during 2008 that Constellation stock was going to become an unduly risky and imprudent investment, and they knew that in advance.

This is the exact same business model, Your Honor, that Constellation had been following since 2001. While it certainly involved significant risks,

those risks were disclosed and those risks had generated significant rewards for shareholders.

So the mere fact that a company has a business model that is disclosed, and has been successful in and of itself cannot be the basis for a prudence claim unless the plaintiffs can show some fact that should have led the fiduciaries to be able to predict the future, and to know what was going to happen in the future with the Plan and with the company stock, and they haven't articulated anything of that nature.

With regard to the collateral downgrade estimate calculation error, which is the second thing that they point to, there's no allegation that the fiduciaries had any idea in advance that that error existed. It was simply a mistake that was found and corrected. It was an automated process where they discovered it, they disclosed it, and the stock dropped when they announced it. Then the stock immediately began to climb back up.

So as a fiduciary looking at this situation, you've got a mistake. The stock is still trading at $83 a share. There's no indication that that reflects some -- excuse me, $83 a share before the mistake, and then it dropped.

There's no indication that this goes to the

fundamental soundness of the business or the business plan. It's simply a mistake that was reacted to. The company shortly thereafter announced that it had secured $2 billion in additional liquidity to be closed on in October.

So a fiduciary even looking at that situation would see that the company had stabilized and certainly does not lead to the kind of extraordinary circumstance where it would no longer be prudent to have an investment in the company.

THE COURT: Did the stock start to go back up again?

MR. MATHIAS: The stock dropped the first day, maybe the first couple days. Then by -- I think it went from 73 down, about $10. Then by August 28th, it was back up to 68.

Now the third thing is the Lehman bankruptcy and its effect on Constellation. I want to talk about that in some detail, but I just want to start with where the Class Period for this case is supposed to start according to the plaintiffs, and go through the time line, and we'll finish up with Lehman.

According to the plaintiffs, if taken literally, as of January 30th of 2008, the fiduciaries had an obligation to disobey the Plan and get every share out

of the company stock, and we submit that that's simply ridiculous.

The stock was traded at $92 a share. It was near all time highs, and absent someone's ability to predict a credit meltdown nine months later, that makes no sense at all.

Fast forward to the end of July of 2008, the stock is still trading at $83. So the stock has gone up and down over the period of seven months. It is now at $83. It has gone down about $9 from where it was January, certainly not a precipitous drop.

There's certainly no allegation that at that point in time any fiduciary should have known what was going to happen in the future or that there was any indication. I mean at that point they didn't know whether the stock would go up the next day or go down, so again, not a situation where the duty to disobey the Plan would come into any effect.

I talked earlier about the August 11th period. You simply have an honest mistake. It was made. It was disclosed. The stock price stabilized. It started to increase, and the company announced additional liquidity.

So again, you've got the stock price trending down along with the market as the market jitters were

increasing, but still a strong company, nothing to suggest, unless somebody could predict the credit meltdown, that the company wasn't going to be in good shape going forward.

So then you get to September 15th. As of September 12th, the company stock had again trended down slightly with the market, and on September 15th, the market opens knowing that Lehman has gone into bankruptcy.

There is no allegation that a fiduciary at Constellation, number one, should have known that Lehman was going to go into bankruptcy, number two, known that the government was not going to bail out Lehman in the way it had bailed out Bear Stearns, and number three, been able to predict in the future, predict the future that that would have a direct impact on Constellation. Let me focus on those things a little more.

The stock closed on Friday, September 12th at $58.38. On September 15th, the Monday, it closed at $47.99. Now this is before Constellation had issued its 8-K, explaining anything about its relationship with Lehman.

So the market is trending downward for a lot of companies in the credit market because there's this

uncertainty about what's going on in the market. But again, a fiduciary in that situation now doesn't have preexisting knowledge or foresight. They're in the situation of reacting to the market in the same way everyone else is, and I don't believe there's a single case, ERISA case under the duty of prudence that suggests that a fiduciary would have an obligation to predict the future or to step in in a fast-evolving situation like that and decide how that situation is going to be resolved.

On September 16th, AIG gets downgraded by the rating agencies. The market continues in general to spiral downward. Constellation ends that day at $30.76 a share.

Now this is the one place where I would say you see the stock now declining at a significant rate, where that wasn't the case on any of these earlier dates. But there are two problems with the plaintiffs' theory in trying to allege a breach of prudence at that point.

First of all, I talked about the lack of advanced knowledge that that was going to happen, and the second thing is what's going to happen the next day or the day after that? Is the stock going to continue to go down?

In truth, what happened, and a fiduciary looking at this situation, the company, within the time frame of that one week, had two offers to stabilize the company and move forward. So they couldn't have been expected to predict the Lehman situation or the complete freezing up of the credit market.

Then they look at the situation. If you're even inclined to consider what they were looking at, we know from the facts that the company was almost immediately stabilized, and the stock began to move up.

So the one situation, and this gets back to the Catch-22, the one thing that the plaintiffs might say is well, the stock continued to drop, and the stock got all the way down to $13 a share one day during that week.

But think about that, Your Honor. If that had happened and the fiduciaries had stepped in, even though they knew that the company was working on these offers that they had and was going to be able to announce something that week, if the fiduciaries had stepped in and divested of the company stock at that point, that actually would have been the worst time to divest of the company stock because we know that it went back up, and went back up to $32 within that

month of September. I'm sorry, not 32. It went up to 26 I believe, and a year later had gone up to 32.

So in fact, the proper and the appropriate thing to do in that situation was -- it was a fast-evolving situation. You have no advanced knowledge. You see the situation. The company is stabilizing. The stock is going to come back. You don't do anything.

If you compare that situation to all the cases where the Moench presumption has been overcome, there's always some advanced knowledge of something. It's usually some kind of illegal activity or accounting fraud or something that's known within the company that the fiduciaries know, that they can say with some degree of reliability is going to cause this company stock to tank and the company is really going to be in trouble. They know it in advance and they do nothing.

That's why I said the timing is so important here. You never have that point in time in this case where the fiduciary had information that the market didn't have and knew what was going to happen on the next day with the stock, or had a pretty good idea of what was going to happen with the stock.

Instead, you have a case where, and we all lived through this, looking at the market every day, every

day they looked at it and had to guess is this the bottom, is it over, is it going back up tomorrow, are there going to be other problems?

But they didn't have any inside knowledge. There was nothing they should have known that told them it would continue to go down. To the contrary, as I pointed out, to the extent they had knowledge at all, they knew that the company had plans to stabilize, and by the middle of that week had announced it.

THE COURT: Short of going ahead and selling off, what do you think should lead a fiduciary that's in this sort of possible double loyalty situation to get some outside advice, ask someone else outside of the company whether there's any problem with continuing to maintain this investment?

MR. MATHIAS: The short answer is no, because in this situation they don't have a duty. They don't have the discretion to act. The settlor has set the Plan, and it is the settlor's function, and the duty only arises if you have this extraordinary circumstance because again, we're not talking about a fiduciary. I think there's an important distinction here.

In the DiFelice case, you had a fiduciary that

had discretion, everybody understands that, had discretion that they could either offer the company stock or not offer the company stock. But in a situation where the fiduciary does not have that discretion, there would be no reason for that.

Whether they've got that or not, they certainly didn't have a duty to get that kind of outside advice, because that's the whole purpose of the Moench presumption, recognizing that the fiduciary does not have that discretion. The Moench presumption only is overcome if those extraordinary circumstances arise. Until that happens, or unless that happens, the courts don't look at all at what in fact the fiduciaries did in the way of investigation.

THE COURT: Well, I'm looking at Moench. I guess I didn't interpret it quite that same way. I mean there would have to be --

Because the duty is somewhere between being permitted and being required, I think the Moench court said well, we're going to give them this presumption of prudence. But they also looked at how the Committee had interpreted the Plan documents, which were fairly similar, if not even stronger in Moench, that were supposed to be invested statewide in the company stock and they said well, that's too strict a

reading.

I mean even in Moench they said no, you've got to admit that there is some discretion under extraordinary circumstances to go ahead and divest, or go ahead and look for a different vehicle.

I thought they discussed at some point also, I think one of the factors to look at if you get to that point and you're going into discovery is well, did they go to anybody else? Did they go to any outside advisor, outside legal counsel, anyone, and say look, we are really in a difficult position here, what do you think? Is this a good investment to continue to maintain?

MR. MATHIAS: Your Honor, the Moench case, if I recall correctly, was essentially looking at the case post trial, or certainly at a later stage.

THE COURT: Yes. There had been a summary judgment.

MR. MATHIAS: Right.

THE COURT: And it reversed the summary judgment actually. The District Court had granted summary judgment and the Fourth Circuit --

MR. MATHIAS: The court was looking at a developed record, and if I recall correctly, the court went through its analysis and went through the various

stages of was there, was there a fiduciary duty, and then talked about the Moench presumption. And it's only if you overcome the Moench presumption that you then get into an investigation of what was done by the fiduciaries in the way of an analysis of the investigation that was done.

At this point, unless those extraordinary circumstances exist to create that duty to do something, it's at that point that the Court would look at okay, what did the fiduciary do in that circumstance?

So the duty to investigate does not arise when you're at this stage and the allegations have not sufficiently been pled.

I think one case to look at in that regard which is factually similar is the Kirschbaum case from the Fifth Circuit.

THE COURT: I looked at Kirschbaum. Don't you think Kirschbaum was a little -- goes a little further than the Fourth Circuit would?

MR. MATHIAS: I don't know. I think the Kirschbaum case is pretty consistent with the cases that have been coming out of the other circuits and out of the Southern District of New York.

Well, just briefly, then I want to jump to the

duty of loyalty, unless you had any other questions.

THE COURT: No. That's fine. Go ahead.

MR. MATHIAS: On the duty of loyalty claim here, which is also part of Count I, it really is a claim that the fiduciaries had made misrepresentations, hadn't disclosed information about what was going to happen to the company stock going forward, and there are really only two points I want to make.

The first is that I don't think they have alleged any materially misleading or inaccurate statements in the SEC filings, other than to say the company was overexposed and risky. Those kind of generalities, for all the reasons I talked about before, really aren't sufficient. So they haven't identified a material misrepresentation, which they need to.

But more sort of fundamentally, and I think the case law is certainly trending this way, the SEC filings of the company, that is a corporate function. It is not an ERISA function or a fiduciary function.

In the Fourth Circuit, an ERISA fiduciary is responsible only for disclosures about Plan benefits, not disclosures about Plan investments. Maybe it should or shouldn't matter, but some of the courts look into sort of what's incorporated into what, and

we spell that out in our papers, even though that may be elevating form over substance, and the basic point ought to simply be that ERISA fiduciaries don't make SEC disclosures.

In this case, it's the securities laws that require the Plan sponsor to issue a prospectus. They then incorporate the other SEC filings, the quarterly filings and the annual filings into the prospectus.

Then here, the SPD, the Summary Plan Description was also incorporated into the prospectus. So it wasn't the other way around, that the Summary Plan Description incorporated those other documents into it, and there's nothing in the Summary Plan Description that encourages people to, in considering their Plan benefits, go read the SEC filings or anything like that.

So for those two reasons, we think the duty of loyalty claim has no merit. That's all I have for now, Your Honor.

THE COURT: All right. Thank you.

MR. GILLESPIE: Your Honor, would you like to hear from all of the defendants first or would you like to alternate?

THE COURT: Well, why don't I ask plaintiffs' counsel.

MR. BLOOM: No, no, no. By all means.

THE COURT: Go ahead.

MR. GILLESPIE: Thank you, Your Honor. I just assumed we were following the protocol from this morning.

On behalf of Constellation and Nine Mile, Your Honor, I'm going to address as previewed the second through fifth counts of the Complaint.

Plaintiffs plead in these counts that Constellation, Nine Mile, and various individual defendants breached fiduciary duties under ERISA. They allege in Count II that there was failure of a duty to monitor the fiduciaries. Count III is a conflict of interest claim. Count IV, there's a co-fiduciary breach liability claim. Then Count V, there's a claim that even if Constellation wasn't a fiduciary, they have some liability for participating as a non-fiduciary, which they breached.

The overarching point I make here, Your Honor, is that each of these claims fails because it's derivative; that is, each claim depends on establishing an underlying breach of ERISA fiduciary duties.

Plaintiffs candidly acknowledge on page 37 of their opposition that if they fail to allege what they

call primary breach of fiduciary duty, their derivative climbs are doomed as well.

As Mr. Mathias has reviewed, plaintiffs have failed to establish a primary ERISA violation. So that's, quite frankly, the end of the matter for Count V.

But as we briefed, each of these counts also have independent deficiencies. I'm not got to review each of them. They're in the papers, and I would like to focus the Court more on the primary claims.

I will discuss, however, briefly the conflict of interest claim, and turning to that, I would like to say that that claim failed because the Complaint doesn't say how any purported conflict caused any defendant to take an action that was detrimental to the plaintiffs.

In DiFelice, the Fourth Circuit made clear that mere status as an officer or director of a company, even if you have an understandable interest in the stock performance, that's not enough to create a conflict.

That's basically all that we have here pled. When we raised this argument in our opening brief, the opposition didn't direct us to anything more than, other than the bare corporate capacity allegations in

the Complaint.

One other point, Your Honor, I would note, following up on Mr. Mathias's points, is that there was, as Mr. Mathias noted, for example, at paragraph seven, in the plaintiffs' laundry list of complaints about why there wasn't prudence, a principal allegation that they have is in subpart (d) in paragraph seven on page three. It's that Constellation somehow, it says, exposed itself to the credit problems of Lehman Brother.

For the reasons we have addressed at length this morning, that allegation just simply doesn't bear up to what the facts were, and our colleagues in their briefing were no more able to identify any specific disclosure to Lehman than the securities colleagues this morning.

With that, Your Honor, unless you have any questions I have completed my presentation.

THE COURT: Thank you. Anyone else? No. Okay.

MR. BLOOM: Good afternoon, Your Honor. My name is James Bloom from Keller Rohrback.

THE COURT: You're going to have to yell or move that mike. You're taller than the mike.

MR. BLOOM: As I said, I'm James Bloom from Keller Rohrback on behalf of the ERISA plaintiffs.

I wanted to quickly clear up one thing that defense counsel was just mentioning about the claim for a breach of the duty to avoid conflict of interest. That's a duty that the Fourth Circuit recognized in the DiFelice case; although in DiFelice they said that mere status alone is insufficient. There are factual allegations in the complaint that are consistent with the allegations that DiFelice said were lacking in that case.

For example, allegations that high-ranking company officials sold stock, you can find that claim in paragraph 215 of the Amended Complaint.

Paragraph 216 alleges that the defendants chose to remain silent because of how selling the shares might reflect on the directors and the company.

So those are two of the types of things that the DiFelice court was looking for to substantiate the duty to avoid conflicts of interest.

THE COURT: I'm not sure how 216 adds anything more to the argument. I mean it makes the argument I guess as is inherent any time in their status as corporate officers, but I guess I'm not --

MR. BLOOM: That's correct, Your Honor. The allegation is not as strong as the allegation that the DiFelice court said would satisfy that duty; but

again, these are, you know, allegations made in a complaint pre-discovery. DiFelice, I believe there was a bench trial of some length.

THE COURT: Right, right. 215, the sale of stock, I think, if I'm remembering correctly from the other complaint, that sale by Mr. Shattuck was back in early February of 2008?

MR. BLOOM: That's right, very near the time that the stock was at its highest price during the Class Period.

THE COURT: Okay.

MR. BLOOM: But looking now at our responsive document, I don't see those paragraphs cited there.

THE COURT: Thank you.

MR. BLOOM: I put up on the screen here, this is the Trust Agreement between T. Rowe Price and Constellation Energy.

THE COURT: Yes.

MR. BLOOM: This is, of course, one of those ERISA Plan documents that is required by the statute. You have to have a trust pursuant to a written instrument.

If you'll notice the last sentence of the first paragraph on this agreement --

THE COURT: Just so I can find this here, let's

see, you're on page 31.

MR. BLOOM: That's right. That has been filed as Exhibit 2, or Exhibit 1 to the Derek Loeser declaration in support of the response.

THE COURT: Right. This particular page is actually in the Second Amendment to the Trust Agreement.

MR. BLOOM: This particular page, that's correct.

THE COURT: Okay.

MR. BLOOM: So if you see where the little hand cursor is on the screen there next to the word the --

THE COURT: Yes.

MR. BLOOM: -- the sentence reads the employer may change or add additional investment options at its discretion, provided, however, the Trustee Agreement is required for the addition of company stock.

THE COURT: Uh-huh.

MR. BLOOM: Now this language was quoted in the response and the reply from defendants was that well, employer here simply refers to Constellation, refers to it in its settlor capacity as opposed to its fiduciary capacity.

However, I'm just going to switch to a different page of this Agreement. Do you see definition of 1.8

there?

THE COURT: And what page are we on now?

MR. BLOOM: This is the third page of the PDF, which I believe is page two of the unamended Trust Agreement.

THE COURT: Okay. I've got it.

MR. BLOOM: Here, the Trust Agreement defines employer to be Constellation Energy Group or any successor company, and includes any authorized designee of the employer, including the Plan Administrator.

So the argument in the reply that that language that Constellation has discretion to choose stock options doesn't seem to quite match up. This reading is definitely, or these documents definitely support the reading that there is a fiduciary at Constellation picking these investment options, which would be the case, as I think even defendants concede, with the other investment funds.

Now one final thing before I move away from this Trust Agreement, if you go to provision 10.4, which is on the 15th page of the PDF, and I believe page 14 of the Trust Agreement.

THE COURT: Okay.

MR. BLOOM: The Trust Agreement notes that in

any conflict with the Plan document, in any conflict between the provisions of the Plan document and this Agreement, the provisions of this Trust Agreement shall prevail.

So under this document, the clear import is that the investment fiduciary as the Plan Administrator at Constellation had fiduciary discretion to select investment options, including company stock.

THE COURT: Okay.

MR. BLOOM: But again, now this Trust Agreement, my understanding of the Trust Agreement is that this is the Trust Agreement for both plans, for both the Nine Mile Plan and the Constellation plan.

Under the Nine Mile Plan, I mean I don't think there is any doubt that there is discretion there about company stock. I mean the Plan says the Plan Administrator may direct that matching contributions will be invested in the CEG stock fund, and that's at page 47. I believe that is cited in our response.

THE COURT: It says that the Plan Administrator may direct that matching contributions will be invested in the Constellation Group.

MR. BLOOM: May direct, that's right.

THE COURT: Right, right.

MR. BLOOM: Also I noted that defense counsel

here today characterized this Plan as an ESOP, an Employee Stock Ownership Plan, but I was unable to locate that language in the Nine Mile Plan document.

THE COURT: Does it make a difference if it's an ESOP or an EIAP for purposes of the presumption of prudence or anything else?

MR. BLOOM: Ultimately, ultimately, no, Your Honor.

Okay. If you take look at Section 404(a)(1)(d) of ERISA, that's D as in delta, ERISA has laid out a fiduciary duty to obey Plan documents, but in the same breath as the statute that Congress created that duty, it also limited it. It limited it to situations where the Plan documents are consistent with ERISA.

Now ERISA, of course, was designed to protect retirement income security, and so it contains numerous provisions about vesting and vesting schedules, and many of those are proposed by a vehicle saying the Plan documents must contain these types of provisions.

So this is a way of saying that even if the Plan document is inconsistent with the provisions of ERISA, that the trustee has a duty to look beyond the Plan document and consider the other provisions of ERISA, for example, the duty of prudence.

Now in their reply the defendants say, the reply to oppose the motion to dismiss on page six, plaintiffs offer no case where a court found a defendant liable for failing to take some action that the defendant never was authorized to take.

The two cases that the plaintiffs cited on that point were the Enron case, and I will start there first. Judge Harmon, you know, was dealing with a situation where matching contributions were to be "primarily in company stock." What Judge Harmon ruled in that context was moreover, an investment fiduciary must disregard Plan documents that following their terms would be imprudent.

The ADP case was the other case cited by plaintiffs in their response. Although defendants correctly point out that the Court in ADP did find discretion, there was dispute about that and in the ruling said even if there was no discretion regarding company stock, a fiduciary cannot escape liability merely by pointing to the Plan as requiring it to act as it did. Even for a fiduciary to act consistent with the Plan's directives, the fiduciary may be liable if the actions were not in the participants' best interests, e.g., they were found to be imprudent.

I believe this Court had a similar ruling in the

In re Mutual Funds case, and also the Morgan Stanley case submitted by plaintiffs' second supplemental authority out of the Southern District of New York also makes that same ruling.

There, the Court found no discretion, said the Plan documents required there to be an investment in company stock; but it nevertheless held there was still a duty of prudence imposed by the statute.

That again was I believe Exhibit C to the second supplemental authority, although I bring that up now because we did make that plain or talked about that in our second supplemental filing.

I guess one last point before I move on from there, even the Moench case itself in its holding that the presumption was rebutted, the way the Moench court phrased it was the trustees have a duty in which they can effectuate the purposes of the trust only by deviating from the trust direction.

So there are some circumstances where even if there is no discretion, the fiduciary must nevertheless look past that.

THE COURT: Right.

MR. BLOOM: Here, while the fiduciaries were examining the prudence of the company stock for their Nine Mile Plan, perhaps they could have considered the

prudence of that stock for the Constellation Plan as well.

THE COURT: When you say the fiduciaries were examining prudence, you just mean you're getting back to the difference in the language of the Plans?

MR. BLOOM: Right. That's right.

THE COURT: Okay.

MR. BLOOM: The fiduciaries had a duty, and had they been exercising that duty on behalf of the Nine Mile Plan, then they would conceivably have been able to apply some of that same analysis in consideration of the stock as far as the Constellation Plan goes.

But turning to the Constellation Plan itself, I think the Court pointed out earlier that the one or more language in Section 5.1(a) would not be violated if the company stock was not offered as an option, and if you turn to 5.1(d), there's a limitation where company stock must only initially be invested in the Company Stock Fund.

THE COURT: Suggesting that they would still have to have a Company Stock Fund available for the matching contributions.

MR. BLOOM: There's no doubt that the Plan comprehends the existence of a Company Stock Fund.

THE COURT: Right.

MR. BLOOM: The question is whether that fund has to be offered or whether any participant's money has to be in it.

THE COURT: So you're going to get to the Complaint and what's alleged in the Compliant and what the circumstances were, going back to my initial questions.

It is obviously a, what seemed to be me obvious, a very hard decision for a fiduciary to know what is that point? When should they go against what certainly appears to be the primary purpose of the Plan?

Are you suggesting, and can you identify a point, and did you really mean January 30, 2008, and tell me why, where you think the fiduciaries had an obligation to sell off the company stock?

MR. BLOOM: Well, quite obviously, the specific date in which that obligation arose is going to depend on the particular fiduciaries and what they knew and what they should have known. So starting the Class Period January 30th, probably no time before January 30 did they have that obligation.

If you look at the statements that the company was making throughout the summer and fall of 2008, there are a few that really jump out here and I think

can help shed some light on this timing issue. Yeah, here we go.

On August 27, 2008 there was an earnings call. So this is now more than two weeks before the Lehman Brothers Bankruptcy. Defendant Shattuck announced or said that the company will have to reduce the capital exposure to these businesses and do so in an aggressive manner. Those are at paragraphs 159 and 160 of the Complaint.

So at that point, clearly the people who are at Constellation and making these decisions understand that they don't have the liquidity that they needed, the credit security to continue their very risky profit-oriented business and are going to have to make some changes.

Now paragraph 178 of the Complaint, this is after the Lehman collapse now, Defendant Shattuck said that they are "hard at work to reduce risks in collateral requirements to adjust to a new environment where prices have declined, markets are liquid and credit is scarce. We have changed the focus of our commodities business to prioritize risk and collateral reduction over the near-term realization of profits."

So those statements indicate a fundamental change in course for Constellation's business, of

course, after the devastating losses of the company stock and the devastating losses to the balances of the retirement plan of the people who invested in the company stock through the Company Stock Fund.

THE COURT: I mean there's obviously a loss that was devastating for a lot of people. If you start at that August 27th earnings call, what happens a couple weeks later is Lehman goes bankrupt.

MR. BLOOM: That's right.

THE COURT: Are you saying that the Constellation fiduciaries, whoever they were, should have forecasted that bankruptcy?

MR. BLOOM: No, Your Honor. What's going on here is that the fiduciaries knew they were exposed. They knew that the company's model was unsustainable and that the company was at risk. What the allegations in the complaint are is that they knew the price of the stock was inflated.

What all of these things go back to is that their knowledge that what it is trading for is more than what it's worth. What this August 27th call is, that's an outward public acknowledgment of what many of them may have known there for sometime. So what they're thinking about is sort of unknowable on the outside prior to discovery, prior to taking

depositions, reading the corporate minutes, and things like that.

So what this indicates is that they were aware that the risk was there, and it happened about two weeks later the risk materialized. They were no longer able to obtain the credit that they needed to manage their commodities business, and in this case, it really pushed the company pretty far down the road to insolvency.

They got an offer from Warren Buffett, which they agreed to take, to buy the entire company for, you know, $4.6 billion, a deal they later backed out of; but nevertheless, at the end of this whole process, it ended up, as paragraph 178 of the Complaint makes clear, changing the focus of their business and selling a 50 percent interest in five of their power plants to EDF for billions of dollars. Again, they needed this liquidity to stay going in any form at that point.

But I don't have the specific date where it was per se, that was the date they had to sell the stock prior to, prior to knowing more about what actually happened inside the company.

THE COURT: Okay.

MR. BLOOM: I wanted to also look at briefly

what the Moench court held was sufficient to rebut the presumption of prudence. On page 572 of the Moench decision, the Court ruled when all is said and done, this is precisely the argument that the plaintiff makes in that case. There was a precipitous decline in the statewide stock. The Committee had knowledge of its impending collapse, and they focused on the members' conflicted status.

There, the people had the dual responsibilities as corporate officers and as ERISA fiduciaries and that conflict, in light of the decline, in light of their knowledge about the inflation, the Court ruled that was sufficient to rebut the Moench presumption in the Moench case itself.

Those are very much like the circumstances we have in this case.

THE COURT: I mean the timing is difficult, but hadn't it been going on for some significant time period in the Moench case?

You can go back and look at the specific facts, but --

MR. BLOOM: That's right. I mean among the other facts that the court in Moench considered, I believe on page 557 of that decision, they commented that the company had a lack of quality management, had

unsound credit practices, and inadequate loan loss reserves, all of which could have been taken right out of the Complaint in this case.

Again, one last thing before turning away from Moench -- well, actually that makes sense.

You asked before who were the fiduciaries and what are the fiduciaries' responsibilities? There are a few sets of fiduciaries in this case. You've got Defendant Behlert, who is the Plan Administrator for both plaintiffs.

You have the Investment Committee which is described in the Constellation Plan and has responsibility for selecting investment options.

You have Defendant Shattuck, who was on the Board of Directors of Constellation, and the Board of Directors of Constellation appointed people to the Investment Committee.

You also have the two entities themselves, Nine Mile and Constellation.

I do want to point out that the Nine Mile Plan does name two different Plan Administrators, which is, as far as I know, acceptable under ERISA to have two different named fiduciaries, both Nine Mile itself and the Plan Administrator, who in that case was Behlert.

THE COURT: Constellation does not do that?

MR. BLOOM: No. Constellation is not itself the Plan Administrator. Constellation is the Plan sponsor, and its fiduciary status comes up in a few different ways.

Constellation is an entity that has responsibility for the actions of all of its employees. All of their employees are in some sense the actions of Constellation, and it's also, and this is just basic principles of corporate law, it is also imputed with the knowledge of, at the very least, its officers and directors, such as Shattuck and the Investment Committee defendants and Defendant Behlert. So what they knew, Constellation also knew.

Now Constellation and Shattuck are not named as prudence defendants because they weren't the ones responsible for choosing the investment option directly.

However, and this is a key point, the defendants argue that the duty to monitor is a purely derivative duty, but it's really not. The duty to monitor has a number of components, and one of those is to provide information necessary for the monitoring fiduciary to do their job.

So, for example, Shattuck, if he knows that the stock is overvalued or, say, grossly overvalued, he

would have a duty to pass that information on to Behlert and the Investment Committee if they didn't know so that they could make the appropriate decision. If they did know, and they didn't make the appropriate decision, he would then have the duty to remove them. So the duty to monitor is not purely a derivative duty.

The duty to avoid conflict of interest is also not purely derivative. However, the co-fiduciary duties and the knowing participation by a non-fiduciary, those two are in fact derivative. So if there's no fiduciary breach, Counts IV and V are out.

Just a few more points here. As far as the duty of loyalty, it does contain a duty to disclose, and not just disclose material adverse information. But under Riggs, which is in the Fourth Circuit, the duty to disclose is a core fiduciary duty, which predates ERISA.

Now there are different aspects of the duty to disclose on different individuals, and that's going to depend to a certain extent on what they do.

However, Behlert, as the Plan Administrator, ERISA Section 101 imposes the requirement of producing a Summary Plan Description, and the named fiduciary is

often responsible for doing that, which is Defendant Behlert, and in this case, the Summary Plan Description specifically incorporated the SEC filings, all Securities and Exchange Commission filings, if memory serves.

So by incorporating those documents, she is taking a fiduciary act that is different from the corporate act of originally making those statements. She is telling the participants all of these statements are part of the Plan documents, and you can re lay on them.

THE COURT: That is where in the -- I've got the SPD. It's Exhibit J. Yeah, J.

MR. BLOOM: Exhibit J, the 29th page of the PDF.

THE COURT: Okay. The SEC filings are incorporated in the prospectus by reference.

MR. BLOOM: That's right. That's the same with Exhibit K, which is the Nine Mile SPD.

THE COURT: Uh-huh.

MR. BLOOM: I believe it's on the same page, although these pages aren't numbered the same way, not on my copy at least. It's on page 28.

MR. MATHIAS: On page 28 of the document.

MR. BLOOM: Yes, page 28.

THE COURT: Okay.

MR. BLOOM: Also, while we have the Summary Plan Description in front of us, on page ESP-13 of Exhibit J --

THE COURT: The incorporation language, is there something that sort of continually updates that? When you get a new SPD, does it update which SEC filings are incorporated?

I mean these particular exhibits at least are incorporating 2002, and 2003.

MR. BLOOM: That's right. And after those bullet points it says in addition, you may receive without charge, upon written or oral request, Constellation Energy's Annual Report to shareholders for its latest fiscal year and copies of all reports.

The fourth bullet point there, all documents filed by Constellation Energy Group pursuant to various sections of the Securities Act after the date of this prospectus and prior to the termination of the offering.

THE COURT: I'm sorry, where?

MR. BLOOM: That's the fourth bullet point there on page 26 of Exhibit J.

THE COURT: Oh, and prior to the termination of the offering of the securities offered hereby.

MR. BLOOM: Right.

THE COURT: Okay.

MR. BLOOM: I wanted to point out one last thing about the SPD. This is still on Exhibit J. This is page 16 of the exhibit, with the page number ESP-13 at the bottom.

THE COURT: Okay.

MR. BLOOM: There's the statement that Constellation Energy Group reverses the right to modify or withdraw purchase and sale rights to Constellation Energy Group stock for any given day to protect its shareholders.

THE COURT: Right.

MR. BLOOM: So that language again seems to indicate that, you know, maybe you have the right to participate in the Company Stock Fund today, but maybe that's not going to be there forever.

THE COURT: Well, it's giving Constellation, I assume Mr. Mathias would probably argue in it settlor's function, the right to change things.

MR. BLOOM: I think the point of the language is that it's sort of ambiguous as to which function Constellation would be acting in that capacity. But, of course, as we point out, Constellation is not a prudence defendant in this matter. But it would be possible for them to delicate that authority and not

be in violation of this language.

The one last thing, the one last point I wanted to make today is about the duty of --

Oh, actually there was one more about the duty of prudence itself. What does being a prudent fiduciary look like?

The DiFelice case actually has a fair amount to say about that. You look both at the merits of the transaction or the lack of a transaction, and the thoroughness of the investigation.

Now the allegation in the Complaint, at paragraph 200, is that there was no investigation whatsoever. Of course, because this is a motion to dismiss, there's no statement denying that, supplying any kind of process that it did in fact take.

THE COURT: I'm sorry. I need to interrupt you for a second. That hum is getting louder. Do you need the computer? Okay. Is that better?

MR. BLOOM: So if we look to the prudence of a particular fiduciary act, that is the standard.

Now the defendants argued earlier that you don't ever look to that prior to dealing with the Moench presumption. However, the Moench case itself says if the fiduciary cannot show that he or she impartially investigated options, courts should be willing to find

abuse of discretion. That is again I believe on 572 of the Moench decision.

THE COURT: Somewhere there is still --

MR. BLOOM: I'm almost finished.

The last point I wanted to make was about the 404(c) defense.

THE COURT: Okay.

MR. BLOOM: Which, of course, in the Fourth Circuit is not really an issue. The court in DiFelice ruled in footnote 3 of the opinion that even if defendants managed to satisfy as a factual matter the voluminous requirements of the 404(c) regulation, the fiduciaries are still liable for the selection of Plan investment options.

So those are two different sets of fiduciary duties, and if they violated the one, that's a problem, regardless of whether they also complied with 404(c).

Do you have any questions?

THE COURT: I'm all right.

If you would like to reply, that's fine.

MR. MATHIAS: Your Honor, just a few things, and if you don't mind, I'll stay here and maybe avoid that microphone.

THE COURT: Sure.

MR. MATHIAS: I said at the outset that the facts really do matter and that the timing matters, and the state of knowledge matters. I think that's as true now as when I said it at the beginning of this.

The law is obviously very important, but I don't think the law, and the distinctions that people have been trying to draw on the law here really is outcome determinative. It's how the facts apply to that law.

In the Moench case, it was a two-year period. The company had lost 98 percent of its value. It had dropped to 25 cents a share. Federal regulators had uncovered regulatory violations. The FDIC had come in and taken over the subsidiary, and the company ultimately filed for bankruptcy.

That is exactly the kind of slow march to death where this kind of thing, where a duty for a fiduciary would come into play.

That is dramatically different from the situation we are dealing with here where, as we talked about, fiduciaries looking at these situations, it's a fast-moving situation, where there has been zero in the way of allegations that the fiduciaries knew something that the rest of the market didn't in advance. They're simply saying we should have predicted what was going to happen in the market.

As to the point about Mr. Shattuck, and the comments that Mr. Shattuck made, first of all, even today there is no information to suggest that if the credit markets hadn't completely seized up as opposed to, you know, having some rocky times, which is the normal situation in the last seven years, there is not a shred of evidence that the company would have been in the situation it was in.

The only time it got into a dire situation was in the first week of September, which was an extraordinary chain of events, external events to the company, not internal events, like in Moench and all the other cases, where a fiduciary would have some reason to know about those internal events, and the company reacted within days, not two years.

The other thing, and I don't know that it ultimately matters, but that I find ironic, is to point out that Mr. Shattuck making comments in August about the company looking to increase its liquidity in light of the rocky credit markets that exited somehow is a bad thing. They said that we were supposed to de-risk.

Well, you don't predict the future, but Mr. Shattuck is looking at a market and he's making reasonable decisions along the way. He doesn't know.

If somebody had told him in August that Lehman was going to go into bankruptcy and that the government wasn't going to bail them out, and the credit markets would be totally unavailable, then the company might have acted differently. But you don't assume that. That's the whole point.

Keep in mind that in August, the company went out and got $2 billion in additional liquidity to close in October. Everybody in the world thought that was a reasonable solution and that nothing between August and October would intervene to make credit totally unavailable.

So that complete absence of any evidence or knowledge or should have known of an impending collapse really is what distinguishes our case from all those other cases.

I just want to make a couple related points in response to plaintiffs' counsel.

They don't specify a time when they think it became inappropriate or imprudent for the fiduciary to continue to offer the stock. That's their requirement under the pleading rules. I mean they have to say that at some point in time the fiduciary became bound to divest and explain why, what it was that fiduciary knew about, not the past performance of the company,

but the future performance of the company that made them bound to divest.

So they simply failed under that pleading burden and I think essentially acknowledged that the January 30th date isn't even plausible, but they haven't specified any other date.

I think that's really all I have right now, Your Honor. Thank you.

THE COURT: Thank you. Mr. Gillespie, anything else?

MR. GILLESPIE: Nothing further, Your Honor.

THE COURT: Okay. Mr. Bloom, anything else?

MR. BLOOM: Nothing further, Your Honor.

THE COURT: All right. Well, again, thank you all very much. I appreciate you all dealing with difficult circumstances. However it comes out, as I said before, a lot of people lost a lot of money. It was not what anybody would have wanted.

But thank you very much. It was helpful. I will give you a decision reasonably soon.

(The proceedings concluded.)

REPORTER'S CERTIFICATE

I hereby certify that the foregoing transcript in the matter of Ronald W. Hays, et al., Plaintiffs vs. Constellation Energy Group, Inc., et al., Defendants, Civil Action No. CCB-08-2663, ERISA Litigation, before the Honorable Catherine C. Blake, United States District Judge, on June 17, 2010 is true and accurate.

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Gail A. Simpkins

Official Court Reporter

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